82D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 739

POSTPONING THE EFFECTIVE DATE OF AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

JULY 19, 1951.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. WALTER, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. J. Res. 82]

The Committee on the Judiciary, to whom was referred the joint resolution (S. J. Res. 82) to amend title 28 of the United States Code so as to add thereto a chapter relating to procedure in condemnation proceedings, having considered the same, report favorably thereon with amendments and recommend that the joint resolution, as amended, do pass.

The amendments are as follows:

Strike out sections 1, 2, and 3 on pages 1 through 11.

On line 5, page 11, strike out "SEC. 4. Notwithstanding" and substitute in lieu thereof the words "That notwithstanding".

On line 9, page 11, after the word "effective" strike out the period and add "until April 1, 1952."

Amend the title so as to read:

Joint resolution to postpone the effective date of amendments to the Rules of Civil Procedure for the United States District Courts.

PURPOSE OF THE JOINT RESOLUTION

The purpose of the joint resolution, as amended, is to postpone until April 1, 1952, the effective date of rule 71A of the Rules on Civil Procedure as adopted by the Supreme Court of the United States pursuant to the act of June 25, 1948 (62 Stat. 869, 961; U. S. C., title 28, sec. 2072) and reported to the Congress on May 1, 1951 (H. Doc. 121), under section 2 of the act of May 10, 1950 (Public Law 510, 81st Cong.).

GENERAL INFORMATION

Under section 2072, title 28, United States Code, as amended, the Supreme Court of the United States has the power to prescribe by general rules the forms of process, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions. When the Supreme Court promulgates such rules it shall be reported to the Congress by the Chief Justice at, or after, the beginning of a regular session thereof, but not later than the 1st day of May, and such rules will become effective at the expiration of 90 days after they have been thus reported.

Pursuant to said section 2072, as amended, the Supreme Court of the United States, by letter dated May 1, 1951, transmitted to the Congress a rule of civil procedure to be followed in condemnation cases in the United States district courts. This rule was designated as rule 71A and is contained in House Document 121, Eighty-second Congress.

The Committee on the Judiciary of the Senate considered the proposed rule 71A and, with the exception of subsection (h) thereof, believes the rule to be meritorious. Subsection (h) provides for the method of trial in condemnation proceedings as follows:

Rule 71A (h). TRIAL. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of rule 53. Trial of all issues shall otherwise be by the court.

The following is quoted from Senate Report No. 502, Eighty-Second Congress:

Taken in its entirety subsection (h) provides a dual system of trial. The judge in his discretion may appoint commissioners to determine the issue of just compensation. There is no right given to either party to a trial by jury. Instead the question of whether there shall be a trial by jury is left to the discretion of the court. The committee takes note of the fact that in approximately 41 States in the United States the right to trial by jury exists in condemnation proceedings. Under existing practice the State law governing condemnation proceedings is followed in the Federal courts. Accordingly, if subsection (h) were adopted in its entirety the basic right to trial by jury existing in all but seven of our States would be abrogated. A breakdown of the systems followed in the States discloses that the right to trial by jury exists in approximately 19 States as a right at the outset of the trial. In approximately 22 States either party may have a jury trial of the issue of just compensation upon exception to the report of commissioners. The committee feels that the basic right to trial by jury is one that should be preserved, as it is obviously the majority will of State legislatures. The committee feels also that it is preferable to give this right to trial by jury to either party at the outset of the trial so as to avoid the duplication that exists when a jury follows the report of commissioners.

The committee feels, moreover, that it is preferable to have an issue as important as just compensation in condemnation proceedings determined by evidence

produced in the presence of a judge. Under a system where the judge is present when the evidence is introduced a proper record is made. If there be error, appeals may be noted with accuracy so as to provide appellate courts with an adequate record of the facts and the legal determinations that have been made.

In order to carry out the views hereinbefore expressed, the committee recommends that rule 71A be disapproved. The committee in its disapproval of rule 71A does not believe that the rule may be disapproved in part and approved in part and for that reason recommends that the entire rule 71A be disapproved even though the only objection to said rule lies in a portion of the language contained in rule 71A (h).

In order to carry out the intent of the Supreme Court in regard to the procedure to be followed in condemnation proceedings Senate Joint Resolution 82 is reported setting forth all of the matter contained in rule 71A as promulgated by the Supreme Court of the United States with the exception of the language referred to in (h) which is the subject of the committee's objection. Senate Joint Resolution 82 as regards (h) of rule 71A sets forth the exact language of the promulgated rule less the objectionable feature thereof, and this language is in accord with the recommendation of the Advisory Committee to the Supreme Court in its recommendations in 1948 and is also in accord with the views expressed by the Department of Justice as they are reflected in House Document 121 of the Eighty-second Congress which is made a part hereof by reference.

For the foregoing reasons the committee recommends that Senate Joint Resolution 82 receive favorable consideration.

The proposed rule 71A (h) is set forth below with the objectionable portion enclosed in brackets.

"(h) TRIAL. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix [, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (c) of Rule 53]. Trial of all issues shall otherwise be by the court."

The Committee on the Judiciary of the House has extensively examined the proposed rule 71A and one of its subcommittees has received testimony from Hon. William D. Mitchell, former United States Attorney General, chairman of the Advisory Committee on Rules for Civil Procedure. In addition the following correspondence was carefully considered by the committee:

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF VIRGINIA,
Harrisonburg, Va., July 13, 1951.

Hon. EMANUEL CELLER,
Chairman of the Judiciary Committee,
House of Representatives, Washington, D. C.

MY DEAR MR. CELLER: I notice in the Congressional Record of Wednesday, July 11, page 8122, the passage by the Senate of Joint Resolution 82, having for its purpose an amendment of the existing law in relation to condemnation proceedings by the United States Government. The resolution appears to have been passed in the Senate without debate, although in the Record of the preceding day there is some brief comment regarding its provisions. The resolution as passed by the Senate carries an amendment from the form in which it was recommended by the permanent Advisory Committee on Rules for Civil Procedure, of which Hon. William D. Mitchell, of New York, is chairman.

The amendment made by the Senate is, in my opinion, of serious importance, as I hope I may point out hereinafter. With your permission, I would like to

trace briefly the history of this legislation. As you are aware, condemnation proceedings instituted by the Federal Government have always followed the procedure prescribed by the laws of the particular State in which the property condemned is situated. This is provided for by sections 257 and 258 of title 40 of the United States Code. This system of proceeding has, on the whole, worked well because United States attorneys who ordinarily conduct condemnation proceedings on behalf of the Government are familiar with the laws of the States in which they are living, although, of course, the result was that procedures in the different States varied according to the laws of the different States.

Several years ago the attorneys of the Department of Justice began an agitation for a uniform procedure applicable in all Government condemnation cases and urged the Advisory Committee on Rules of Civil Procedure to formulate and recommend such a rule to the embodied in the Rules of Civil Procedure. In such a rule an important feature became the provision whereby the valuation of the land taken was to be assessed. The Department of Justice recommended to the Advisory Committee a provision that either party to the condemnation proceeding might have a right to demand trial by jury on the valuation of the property.

This proposal for jury trials was vigorously opposed by the Tennessee Valley Authority which, by virtue of the TVA Act, has the valuation of lands fixed by commissioners appointed by the court. In response to a letter from Mr. Mitchell, I became interested in the provisions of this rule because of the fact that there has been a great deal of condemnation work in this district and because, in pursuance of the provisions of the Virginia statute, the fixation of values has always been by means of commissioners. At that time, I wrote to Mr. Mitchell expressing my views as to the desirability of having values fixed by commissioners. I am taking the liberty of enclosing a copy of that letter, with the request that you take the trouble to read it, as it sets forth my views in some detail.

The Advisory Committee was sufficiently impressed with the views expressed by those of us who pointed out the mertis of using commissioners to make awards that, in the proposed rule, it provided that trial should be by juries unless, because of the character or location of the property to be condemned, the court was of opinion that the issue of compensation could best be determined by commissioners. In this form the Supreme Court approved the rule and submitted it to Congress.

The Senate has now stricken from the rule that provision which gave the court the right to appoint commissioners under certain circumstances and, as adopted by the Senate, the rule provides that any party may have a trial by jury on demand and, unless such demand is made, a trial of the issue of just compensation shall be by the court. It is this amendment which, in my opinion, is most seriously harmful.

From the brief comments on the floor of the Senate, it would appear that certain Senators thought that the purpose of the rule as proposed was to deprive landowners of jury trials. As a matter of fact, those of us who urged the use of commissioners were actuated by the desire to see that humble people whose lands were of little value were not compelled to go to the expense of presenting themselves in court to have their land values determined by a jury. The elimination which the Senate has made favors only the Government. It enables Government attorneys to demand jury trials where they know that the landowners are too poor and do not have enough involved to make it worth while to employ lawyers and come into court, with the result that the Government will have values fixed merely on the testimony of its own professional witnesses.

I might say also that in districts where there are many tracts of land to be condemned it will be a physical impossibility for any judge to give the time necessary to trying valuations of each tract by a jury or before the court. I will ask you again to read my letter to Mr. Mitchell, where I elaborate on this feature. I have had an opportunity to observe the conditions in some districts where jury trials are used for the fixing of land values and I find that even where there is no contest about values there are hundreds of cases pending for 5 and 6 years because the court simply could not get around to holding jury trials on all of these small tracts of land.

I have taken the liberty of writing you because I feel very earnestly about this matter. I feel that the Senate has misconceived completely the purpose intended by giving the court discretion to appoint commissioners and I feel that to adopt the rule as amended by the Senate would lead to great hardship on many landowners and an intolerable burden on the courts. It would be much better not to adopt any rule at all and leave the statutory provisions as they now are, allowing the procedure to follow that prescribed by the laws of the States. Another reason why I feel justified in writing is because I feel a certain degree of

responsibility for the form of the rule as recommended by the Advisory Committee, as you will see from the report of that committee made to the Supreme Court. Inasmuch as I may have had some influence in the formulation of the rule, I certainly do not wish the impression to be gathered that I was trying to deprive people of jury trials. On the contrary, my whole idea was to protect them in their rights.

I trust you will pardon this lengthy letter and also the lengthy enclosure but, as I have stated, I feel earnestly about this matter and it is on a subject on which I have had some 18 or 20 years of experience. My purpose in writing to you, as I am sure you will realize, is upon the assumption that the joint resolution will come before your committee for its consideration and recommendation and my hope that you will give consideration to what I have written.

Very truly yours,

JOHN PAUL, *District Judge.*

UNITED STATES DISTRICT COURT,
Harrisonburg, Va., February 13, 1947.

Hon. WILLIAM D. MITCHELL,
Chairman, Advisory Committee on Rules for Civil Procedure,
20 Exchange Place, New York 5, N. Y.

MY DEAR MR. MITCHELL: I am in receipt of your letter of February 6 referring to the fact that the Advisory Committee is working on the draft of a rule to govern condemnation cases, and in which you quote certain provisions of the proposed rule as presently drafted.

I note also what you have to say as to the attitude of the TVA toward the substitution of jury trials for the commissions now prescribed by the TVA Act and your inquiry that, in view of my experience with TVA cases, you would like to have my viewpoint on this matter.

I think I should say in the first place that I am unalterably opposed to the adoption of any statute or rule which would provide generally for the use of a jury trial in fixing the values in condemnation cases. This view is not based solely on my experience with TVA cases, but primarly upon my experience with a large number of condemnation cases in my own district. As a matter of fact, I believe that I have had the experience of sitting in only one TVA case as a member of a three-judge court, although that experience was somewhat extensive. However, during the time I have been on the bench in this district I have disposed of many hundreds of condemnation cases under the procedure provided by the State statute, and which has general similarity to the TVA procedure in that the valuations of land are determined by commissioners appointed by the court and that at no stage of the proceedings is a jury trial provided for.

I sincerely believe that the procedure provided by the Virginia statute, and which this court follows by virtue of the Federal statute providing for conformity in such matters to State practice, is the best and simplest procedure for condemnation that can be devised and the one which, on the whole, obtains the fairest and most satisfactory results to all parties concerned. If I may be allowed to refer to the Virginia statute briefly, it provides for the appointment of five commissioners who must be freeholders and residents of the county or city wherein the land lies. These commissioners are compelled to view the land and to make report to the court of its value. No appeal as of right lies from the report of the commissioners and neither party has the right to have the valuation retried by any other tribunal. While either party has a right to except to the report of the commissioners and to bring its exceptions before the court, our courts have held that the report of the commissioners is entitled to such weight as that it should not be set aside except upon a showing of bias, prejudice, or corruption on the part of the commissioners or on a showing that they misconceived the principles upon which valuation was to be fixed. If the court should for any of these reasons set aside the report, the procedure is to appoint a new commission. However, the necessity for appointing a new commission is extremely rare. The courts are accustomed to appoint as members of the commission men of known standing, integrity, and impartiality, who have the respect and confidence of their fellow citizens, and it is really remarkable to know the very large proportion of cases in which the report of the commission is accepted without question by both the condemnor and the landowner.

You will notice that the Virginia statute proceeds on the simple theory that the best way to determine the value of real estate is by a valuation fixed by intelligent and honest persons in the community who know the land and, having adopted

that method, our courts are very loath to disturb the valuation so fixed. In many generations of this State's history this procedure has worked with remarkable satisfaction and with a minimum of complaint.

Our procedure is, in substance, the same as that pursued under the TVA statute, with the exception that it is our requirement that the commissioners shall be selected from the county where the land lies, whereas the TVA statute provides that they shall be selected from a different locality; and with the second point of difference that under our procedure there is no right of appeal to any tribunal for a hearing de novo, but only the right to take exceptions to the award upon the grounds that I have mentioned. I might say here that much of the matter contained in the statement of the TVA before your committee, a copy of which you inclosed to me, is thoroughly applicable to conditions which have existed before me and I am in agreement with what is there stated. I refer particularly to that part of the statement beginning with the last paragraph of page 1 and continuing through pages 2 and 3. I think the statement there contained should be given particular weight, in view of the conditions which I outline in the next succeeding paragraph of this letter.

It appears to me that such cases in condemnation as the United States Government will institute in the next quarter of a century will, in a substantial majority of instances, relate to lands in rural or mountainous areas which will be acquired for the construction of power projects, flood control, dams, the extension of the national forests, and other efforts of that sort. The Government already has all of the property it needs, or will need for a long time, for other purposes, such as Army camps, arsenals, and naval bases; but I think we can expect that in the next generation large Federal expenditures will be made for flood control and other purposes such as I have mentioned and that, with the exception of the routine acquisition of sites for post offices and a few other Federal buildings, most of the condemnation cases will involve the acquisition of lands along rivers and mountain streams and in more or less remote sections of the country. In condemnation cases of this sort they will be met with the same experience which the TVA has had and which is so clearly referred to in the statement furnished to you by the TVA.

It is with the acquisition of such remote tracts of land that my principal experience has been in condemnation cases, and that experience has been extensive. Since the enactment of the Weeks Act in 1912, very extensive tracts of land have been acquired for the national forests in this State and this work of acquisition continues from year to year. At the present time there are approximately 1,500,000 acres of land in this district which have been acquired for the national forests. The total area which the Forest Service is authorized to acquire and expects to acquire in the course of time comprises approximately 2,100,000 acres in addition to that already acquired.

Of course, a great deal of this land is acquired by purchase, but out of the present area owned by the Government about 25 to 30 percent has been acquired by condemnation. As to the remaining land yet to be acquired, it is not expected that condemnation will be required in more than 10 percent of the cases.

However, when it is pointed out—and this has been the experience of the Forest Service over a long number of years—that the average tract owned by an individual landowner is from 90 to 110 acres, you can readily realize the number of cases which will come before this court in condemnation and which have come before it in past years. It would obviously be an impossibility for any one judge, or half a dozen judges, to fix the valuations in these cases through any trial procedure in court. It is true, of course, that in a large number of these cases the valuations are agreed upon between the Government and the landowner, and the condemnation proceeding is merely because of defective titles. But even so, if a judge had to go through the brief formality of sitting in court to pass upon agreed awards, he would have time for nothing else and, of course, there are a substantial number of cases where the valuation is contested.

But the main objection to trying any contested condemnation case of this sort does not lie in the intrusion upon the time of the court. Much stronger objections are (1) requiring these landowners, most of whom are humble people without means, to go to the expense of proceeding to some place of holding court which may be hundreds of miles from their homes in order to have the land valuation fixed by a jury and (2) the unsatisfactory results of having these land valuations passed on by a jury, no member of which in all probability lives within the area where the land is located or has any knowledge whatever of land values in that vicinity. Most of these rural and mountainous tracts are not of such value as would justify a landowner in going through the expense of trial at some point distant from his home, with the result that many of the cases would be undefended

and juries possessing no knowledge of the values of the land would value them merely on the testimony of Government witnesses. My conviction is very deep that no jury sitting in a city 100 miles or so from a rural tract of land can arrive at a judgment of its value with anything like the accuracy of a group of intelligent men who live in the vicinity where the land lies, who can go upon it and view it and who know land values in that vicinity. The suggestion that juries may be taken to view the land would be completely impracticable in most cases of the sort I have mentioned because of the expense and delay of any such visit. It would not be worth while to load up a bus full of jurors and take them 200 miles into the mountains to view a piece of land worth $300 or $400.

The reason I have emphasized at such length the conditions which I have just pictured is because, as I have stated above, I believe that most of the cases in condemnation which the Government will have in prospect within the next generation will be of this sort. The Forest Service, for example, has suspended the acquisition of lands during the war, but is now preparing to embark upon the completion of their program. Already several other proceedings in condemnation have recently been instituted in this district involving flood-control projects of an extensive nature, all of which are going to require the acquisition of a large number of small individual tracts extending along rivers and mountain streams to remote sections. I take it that this situation is not confined to this district but that the same thing is happening and will happen for some years to come throughout the United States generally.

For these reasons, you can see my strong opposition to any procedure providing for the use of jury trials in the fixing of land values in condemnation cases. Not only do I believe that the plan would be impracticable and be a tremendous burden upon the courts, but I sincerely believe that the use of commissions under substantially the Virginia procedure accomplishes the fairest and the most satisfactory results. I might add that I am not without experience in the jury trial method of fixing values, for I have served in other districts where this procedure was in use, and my experience in these other districts has served to confirm my advocacy of the use of commissions. Particularly have I been impressed with the congestion of the courts with condemnation cases where the jury trial is used and of the delay in disposing of these cases.

Speaking generally, I think that the provisions of the TVA Act are quite satisfactory and, as I have stated, I agree with the statement furnished you by the TVA as to the good results accomplished by that act. I do believe, however, that in the long run, and not for special purposes, the commissioners appointed to fix the value of the land should come from the locality where the land lies. I believe further that there is no necessity for, and that it is not advisable, to have a hearing de novo as a matter of right before the court in the case of any dissatisfaction with the award of a commission. I am very doubtful that a court that is composed of three judges, or more or less, who undertake to fix the value of land by a hearing in a courtroom can do so with as much accuracy as a commission of practical men who have been upon the land and know it. I think the procedure in Virginia, which tends to accept the report of the commission as final except upon a showing of prejudice or corruption, etc., is better and leads to a more expeditious and equally just determination of the case.

As you can see, I have the deeply imbedded belief that the procedure provided by the Virginia statute, and which is the one followed in the Federal court in this district, is especially satisfactory. I would favor strongly its adoption as the basis for any Federal statute or rule of procedure for the Federal courts if such a rule is to be adopted. And, as you can also see, I am very vigorously opposed to the use of jury trials in these cases. For these reasons, the present draft of the proposed rule as set out in your letter is one to which I am bound to express my opposition. This applies even to the third paragraph of the proposed rule because of the fact that, even if no jury trial is demanded, the demands upon the time of the court would be impossible of fulfillment.

To sum the matter up, I will say that my own experience leads me to thorough agreement with the reasons which the TVA has set out in its communication to you as to the virtues of the procedure utilized by the TVA. Where there are a number of tracts of land to be taken within a large area, I think it is inevitable that any attempt to fix values other than by commissioners will lead to inconsistencies and injustices in a marked degree. I am particularly impressed with the argument made on page 2 of the TVA statement that the commissioners are in position to test the values of any tract of land in relation to the value of other similar and adjoining tracts, whereas if these valuations are tried before separate juries the widest sort of inconsistency may prevail in the awards. For

example, one jury might fix a valuation on tract X in an amount decidedly larger than another jury might value tract Y; whereas everybody in the community knows that tract Y is more valuable than tract X, and this fact would have been instantly apparent to any body of commissioners who viewed the two tracts and valued them in relation to each other. Such inconsistent results lead to dissatisfaction among landowners and to questions as to the wisdom and justice of the court.

It may be that fair and just results can be obtained through jury trials in condemnation cases where they involve only a single property, such as a city building, or where the property is of a special nature; but, even in such cases, it is my belief that an equally fair result could be obtained through the use of commissioners. But I am thoroughly convinced that the attempt to use juries in all condemnation cases would be impracticable and that the use of juries where a large number of adjoining or similarly situated properties are involved would result in a disastrous situation, both in its burden upon the courts and in the justice of the results obtained.

You may feel that what I have written is not closely responsive to the questions which you have submitted to me and that I have taken advantage of your letter to elucidate my own views. But I have felt that your questions could best be answered by thus setting out my own experience and observations. I apologize for the lengthy letter which I have composed in doing this.

With my kind personal regards, I am,

Sincerely yours,

JOHN PAUL, *District Judge.*

Upon the consideration of all the evidence submitted, the committee believes that the issue involved is of such an importance that it should be studied further and that no hasty judgment on the merits of it should be passed.

The committee is unanimously of the opinion that neither rule 71A as proposed by the Supreme Court nor as amended by the Senate should become effective on August 1, 1951.

It is proposed, therefore, that Senate Joint Resolution 82 be amended so as to defer the effective date of rule 71A of the Rules of Civil Procedure, pending further study of the entire matter.

The effect of action proposed to be taken would be as follows:

1. Status quo (conformity system) would prevail until April 1, 1952, in condemnation cases tried in Federal courts.

2. If no legislative enactment occurs in this matter prior to April 1, 1952, rule 71A as submitted to the Congress on May 1, 1951, will become effective.

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